

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 30, 2009

4:38 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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EMERGENCY TELEPHONIC HEARING re Debtors' Emergency Motion for
an Order Pursuant to Section 362(a) of the Bankruptcy Code
Enforcing the Automatic Stay

Transcribed by: Lisa Bar-Leib

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8 BY: PAUL J. COUCHOT, ESQ.

1 P R O C E E D I N G S

2 THE COURT: This is by counsel for the debtors in
3 connection with an emergency motion and a proposed order to
4 show cause fixing a hearing to consider that motion. Who's on
5 the line?

6 MR. WAISMAN: Good afternoon, Your Honor. For the
7 debtors, Lehman Brothers Holding Inc. and Lehman Commercial
8 Papers, Shai Waisman from Weil Gotshal & Manges.

9 MR. COUCHOT: Good afternoon, Your Honor. This is
10 Paul Couchot of Winthrop Couchot in Newport Beach, California
11 on behalf of the what is referred to in the motion as the SCC
12 entities.

13 THE COURT: Is there anyone else on the line? Is
14 there anyone else who needs to be on the line?

15 MR. WAISMAN: Your Honor, Shai Waisman. The
16 creditors' committee, I believe, is joining. They might be
17 delayed just -- by last minute nature of our request. I
18 believe they're intending to join.

19 THE COURT: I don't want to start this until
20 everybody who should be on the line has already joined. So
21 maybe we should take a five minute break until they join. It
22 might be worth having somebody who has e-mail access or an
23 ability to call offline to check and find out the status of
24 their attempt to join the line. And also, if you could tell me
25 who you think from the committee's team will be participating.

1 MR. WAISMAN: Your Honor, we have somebody calling as
2 we speak. My understanding is that it will be Dennis O'Donnell
3 of the Milbank firm for the committee.

4 THE COURT: Okay. Let's just wait for a minute or
5 two.

6 MR. WAISMAN: Okay.

7 (Off the record)

8 THE COURT: So I'll turn it over to Mr. Waisman to
9 explain what it is that he's seeking this afternoon.

10 MR. WAISMAN: Thank you, Your Honor. And thank you
11 to the Court and all the parties who are facilitating this on
12 such short notice. Your Honor, what we are requesting is an
13 emergency motion enforcing the automatic stay in these Chapter
14 11 cases. The Court has had involvement with this matter
15 before -- well, I'll briefly run through the facts without
16 belaboring the record.

17 THE COURT: I'm actually familiar with the facts.
18 You can put this on the record if you wish but I have received
19 copies of the debtors' moving papers, the emergency motion and
20 the affidavit which you prepared as well as the proposed order
21 to show cause. I note that there is an attachment of the
22 transcript from a hearing that I remember very well that took
23 place in November where Mr. Kessler was involved when he was
24 one of your partners on behalf of the debtors in opposing
25 relief from the stay being sought by the SSC (sic) parties.

1 And so, you can go through the facts if you wish but I'm
2 telling you now that I'm familiar with the facts.

3 MR. WAISMAN: Okay, Your Honor. Thank you. And I'll
4 therefore make it very short. As Your Honor pointed out, the
5 SCC entities brought on an expedited hearing before the Court
6 requesting a modification of the stay to proceed with
7 unfettered discretion in their cases because if they did not
8 have that relief they could -- which immediately befall the
9 properties including various threats to health and welfare. As
10 a result, this Court referred the matter for expedited
11 consideration on November 20th.

12 The movants made clear in that hearing that one of
13 the reasons they needed to seek relief from the stay or be
14 granted relief from the stay was because they intended to make
15 a motion in their case to use LCPI's cash collateral. There
16 was lengthy discussion of that on the record. At the
17 conclusion of the hearing, Your Honor -- and I was not
18 involved. My partner, Mr. Kessler, who has since retired from
19 the firm, took the lead for LCPI in the matter but at the
20 conclusion, the Court was very clear with the SCC entities.
21 There were two ways to proceed. Either they come back before
22 the Court with specific requests for relief that were clearly
23 tied to the Sonnax factors at which point the Court would
24 consider their requests and debtors' opposition, if any. Or
25 the parties could work out their issues and settle the matter.

1 An order was entered subsequently, I believe, on the very next
2 day. There was no appeal, no request for a rehearing. And, in
3 fact, there was never a motion brought before Your Honor.

4 Quite astonishingly, instead of coming back to Your
5 Honor, the SCC entities decided about two months later to
6 disregard the automatic stay in these cases, disregard their
7 appearance before Your Honor, disregard Your Honor's
8 instruction, clear instructions as to how this matter was to
9 proceed, and filed a motion in their case, which is also
10 annexed to our emergency motion, and in the very first
11 paragraph, on page 2, paragraph 8, the first line, seeking
12 authorization for Palmdale Hills Property to use the surcharge
13 pursuant to 506(c) that purported cash collateral of Lehman
14 Commercial Paper Inc. Lehman Commercial Paper Inc. remains a
15 debtor before this Court and the automatic stay remains in
16 place. And we would ask that the automatic stay be enforced
17 and Your Honor's original order stand and that the SCC entities
18 not circumvent this Court and the automatic stay. And if they
19 so choose to continue to prosecute a request for relief in cash
20 collateral do so in accordance with the Bankruptcy Code and the
21 directives of this Court. And the SCC entities are, 'cause
22 they already have, likely a response that the stay has been
23 completely waived by actions in their cases and that we should
24 all forget what happened before Your Honor because the
25 California court has authority to modify the stay in these

1 cases. This is exactly the position they've taken in their
2 case on this very issue.

3 THE COURT: This is the first I'm hearing that.

4 MR. WAISMAN: There have been -- in addition to this
5 motion, out of abundance of caution, LCPI responded in
6 California. And its reply started off with there's an
7 automatic stay in place. There was a hearing before Judge
8 Peck. Judge Peck ruled and this is nothing more than an
9 attempt to circumvent the automatic stay and the Court's
10 ruling.

11 THE COURT: Now just so I'm clear, Mr. Waisman, is
12 today's telephonic proceeding one in which you are seeking the
13 scheduling of a hearing or are you treating this as if it is
14 the hearing itself because I'm hearing what amounts to
15 substantive argument. I'm just trying to understand what we're
16 doing.

17 MR. WAISMAN: I'm treating this, Your Honor, as the
18 hearing itself.

19 THE COURT: And is that something that --

20 MR. WAISMAN: The SCC entities have requested to
21 proceed with their motion to use LCPI's cash collateral on
22 Tuesday of next week.

23 THE COURT: Well, here's my confusion. I just want
24 to make sure that I know what's going on. And I was in another
25 meeting when I first heard about this. Read the papers prior

1 to the start of this proceeding but when I read them, it was my
2 belief that you were seeking an order to show cause to schedule
3 this for a hearing sometime next week perhaps on Monday because
4 the order to show cause includes a blank date and indicates
5 that the motion is to be served on or before January 30 on all
6 parties entitled to receive notice of the motion.

7 So my first question is what are we doing right now.
8 And is this a consensual hearing on the merits of your motion
9 or is this is a consensual hearing with respect to the order to
10 show cause or is there no consent? I just want to know what's
11 going on.

12 MR. COUCHOT: May I speak, Your Honor?

13 THE COURT: And is that Mr. Couchot? Couchet?

14 MR. COUCHOT: Yes, Your Honor. Couchot.

15 THE COURT: Couchot?

16 MR. COUCHOT: Yes. Your Honor --

17 THE COURT: I remember that you --

18 MR. COUCHOT: Your Honor, I'm appearing today and I
19 rearranged plans that I had because I was told that you wanted
20 me to make myself available. So that's why I'm here. I'm not
21 consenting to anything. We filed a reply today that had a
22 deadline of noon today and our position on today's issue is set
23 forth in that reply. And I disagree with the characterizations
24 made about what the motion was. And I understand Your Honor
25 was there and you said you remember it very well. But the

1 thrust of the motion was --

2 THE COURT: You were there, too. My recollection is
3 you were sitting in the courtroom as Morgan Lewis & Bockius was
4 arguing the motion. And you were physically present and I was
5 looking right at you.

6 MR. COUCHOT: Absolutely.

7 THE COURT: Okay. So we know who we are and we know
8 that we were both present at a time when I made an absolutely
9 clear ruling that you heard. And are you telling me that you
10 decided I'll just try my luck in California before Judge Smith?

11 MR. COUCHOT: No. That's not what happened, Your
12 Honor.

13 THE COURT: Well, you better tell me what happened.
14 You better tell me clearly and treat yourself as if you're
15 making a representation to the Court that's subject to
16 sanctions if it's not accurate.

17 MR. COUCHOT: Yes, Your Honor.

18 THE COURT: Go ahead.

19 MR. COUCHOT: We believed that our motion was
20 primarily one of two things. I was -- two different things.
21 One we were asking for the Court to give us relief from stay to
22 file a priming motion in California. And on top of that, we
23 asked for a general relief as best we could to administer the
24 cases. The emergency nature -- and in the general relief, we
25 listed several different things that, you know, might possibly

1 need to do and cash collateral was absolutely one of those
2 things.

3 The focus at the hearing, and I've reread the
4 transcript, was that the -- term sheet on a DIP financing that
5 clearly the judge -- Your Honor, in my view, after reviewing
6 even this right now made a determination that the priming lien
7 loan would violate the stay.

8 THE COURT: No. You're absolutely -- you are totally
9 and completely wrong. And if you're trying to recharacterize
10 what I said, you better be careful. I remember it and I've
11 also recently reviewed the transcript. And I remember very
12 clearly the procedural history. It was a general motion
13 seeking relief from the automatic stay without specificity.
14 Your counsel when you were present in court made an argument
15 that was wanting in all respects because of a failure to deal
16 with Second Circuit applicable precedent, the Sonnax standards.
17 And, in fact, when asked to identify how the Sonnax standards
18 applied failed completely and ducked the question. I remember
19 the hearing extremely well.

20 MR. COUCHOT: I agree that that occurred during the
21 hearing, Your Honor. I'm not trying to --

22 THE COURT: Now, if you are attempting through this
23 conversation to characterize my ruling or my order, you are out
24 of order. If this is some kind of explanation as to how you
25 think this is permissible behavior, you are wrong. It is

1 completely impermissible and sanctionable behavior and, in my
2 view, constitutes a willful violation of the automatic stay.
3 You could not have been on more direct and obvious notice than
4 you were. I was looking right at you.

5 Now what are you going to do?

6 MR. COUCHOT: Your Honor, if you're telling me that
7 your order -- I'm going to obey your order.

8 THE COURT: Excuse me?

9 MR. COUCHOT: I said I'm going to obey what you're
10 saying. I'm going to comply with what you're saying today.

11 THE COURT: Only because I've just said it?

12 MR. COUCHOT: Your Honor --

13 THE COURT: There was no motion for reconsideration.
14 There was no appeal. And, in fact, if you remember clearly
15 what I suggested in the strongest possible terms, I suggested
16 that counsel meet and confer in an effort to develop a means by
17 which your client could deal with Lehman. Did that happen?

18 MR. COUCHOT: Yes, Your Honor. It did. We flew back
19 the next week and that was done personally. Yes, we made -- I
20 called, I believe, Mr. Kessler the next day and requested a
21 face-to-face meeting. And we flew back to New York and met
22 with Lehman, Mr. Kessler and with two representatives of
23 Alvarez & Marsal.

24 THE COURT: And what was the result of that?

25 MR. COUCHOT: Well --

1 THE COURT: Now these are settlement discussions so
2 it may be you don't want to talk to me about it.

3 MR. COUCHOT: Yes, that's my hesitancy, Your Honor.
4 I mean, I would love to tell you what happened but I -- suffice
5 it to say we were very far apart.

6 THE COURT: And you apparently made the decision not
7 to file, which was your privilege if you chose to exercise it,
8 a follow-up motion for stay relief. But instead, to act as if
9 what happened here didn't count, didn't matter?

10 MR. COUCHOT: May I speak, Your Honor?

11 THE COURT: Of course.

12 MR. COUCHOT: There's a related case involving SunCal
13 entities and Lehman Commercial Paper before Judge Smith. In
14 that case, Judge -- he's actually represented by Mr. Al Siegel,
15 who's the Chapter 11 trustee in that case -- moved for use of
16 cash collateral in Judge Smith's courtroom. Lehman Commercial
17 adamantly opposed the motion. Lehman Commercial did not raise
18 the stay as being invoked. And in a fully briefed -- I think
19 there were two different hearings on the issue. It never once
20 raised -- and in our view -- again, I know you disagree with me
21 but, in our view, cash collateral was not the focus and there
22 was no determination in your courtroom that cash collateral
23 violated -- the use of cash collateral would violate the stay.
24 What we heard -- what I heard was talk to Lehman, try to work
25 something out. I'm not giving you general relief. If you

1 think that you need relief from stay, come back and be
2 specific. From our standpoint, at this point in time, Lehman
3 Commercial was not taking the position that the use of cash
4 collateral violated the stay. And we did our own research and
5 we felt that that was the case. And we figured, from our
6 thinking, we had a hearing -- we got a conference in front of
7 Judge Smith and I announced that we were going to use -- make a
8 motion for the use of cash collateral. We even had a turnover
9 motion on this account and we worked conceptually with Lehman
10 at the divided briefing schedule. We even had further talks to
11 try to work things out as recently as, I believe, yesterday or
12 the day before. And it was only until we received their
13 opposition that we understand that they were taking a position
14 that the use of cash collateral violated the stay and that your
15 order did so, too, that your order had made that determination.
16 And I've looked at the transcript and I think you did make that
17 determination after a priming lien because that's what --
18 you're right. The general order and everything else you said
19 about that hearing is correct. But the cash collateral issue
20 was one of the several -- list of things that really wasn't the
21 focus. The focus was, in my opinion, was what you've
22 mentioned, was that we need to go through those factors and
23 that the priming lien motion you said would be burdensome to
24 the estate and would harm the estate and therefore, clearly, in
25 my mind you said there was a violation of the automatic stay.

1 But we proceeded with this motion in good faith that Lehman
2 Commercial was not taking the position that cash collateral
3 violated the stay. In that related case that's in front of
4 Judge Smith.

5 THE COURT: Okay. Well, I know nothing about that
6 related case. And this is not a hearing on possible sanctions
7 for willful violation of the automatic stay although that may
8 happen at some time in the future at which point the comments
9 you're making might be helpful. They're not helpful to me now.

10 MR. COUCHOT: I have the reply papers, Your Honor,
11 that has all that information in there that I could e-mail to
12 you as well.

13 THE COURT: I don't need to see them tonight.

14 MR. COUCHOT: Okay.

15 THE COURT: The only thing that is before me now, and
16 I think I've already made clear what my position is, is that
17 you have no stay relief. You know you have no stay relief.
18 And that denial of the motion brought by you and your local
19 counsel, Morgan Lewis & Bockius, in November speaks for itself
20 and there is a final order which denies that motion. The legal
21 consequences of that denial are what they are. I have no
22 knowledge, and I don't expect to get that knowledge now, as to
23 what happened in California. To the extent relevant, I'll
24 learn it in due course.

25 The only thing which is before me is an emergency

1 motion to enforce the automatic stay. It is enforced to the
2 extent applicable. I'm not expanding it nor am I taking away
3 from counsel the ability to reach agreements to modify it. But
4 if you don't come here and seek consensual relief from stay or
5 relief from stay with appropriate motion practice, you are at
6 full risk as is your client. Act accordingly.

7 MR. COUCHOT: Well, thank you for making that --
8 allowing me to make a record, Your Honor.

9 THE COURT: Excuse me?

10 MR. COUCHOT: I appreciate the fact that you allowed
11 me to make the record on that. Thank you.

12 THE COURT: I didn't think that's what just happened
13 but okay. I just heard you make some statements about what you
14 believe may have given you cause to believe that what you were
15 doing was permissible. I have not for a moment suggested that
16 I agree with you. Nor is there a record here on the basis of
17 which I could make such a finding. We're just having a
18 conversation.

19 MR. COUCHOT: I understand, Your Honor.

20 THE COURT: Now what happens next, Mr. Waisman?

21 MR. WAISMAN: Your Honor, I believe Your Honor's
22 ruling is clear. I believe the stay is in force and --

23 THE COURT: There could never be a doubt on that
24 question.

25 MR. WAISMAN: I believe the SCC entities need to act

1 in accordance with the stay and whatever the stay applies to.
2 And I think that point has been made clear. But I would expect
3 that there would be either a consensual resolution among the
4 parties or a motion on proper notice and properly briefed
5 before this Court for modification of the stay that Your Honor
6 will rule on one way or the other in due course and that there
7 would be any proceedings before that.

8 As for the other allegations of waiver and the like,
9 there's no need to belabor the record. When and if those
10 issues are relevant, they'll be addressed.

11 MR. COUCHOT: May I speak, Your Honor?

12 THE COURT: Of course.

13 MR. COUCHOT: This waiver is definitely not -- that
14 was made. The issue is whether or not the use of cash
15 collateral violates the automatic stay and that the -- Palmers
16 indicates that it does not. In addition to the fact that
17 Lehman Commercial did not waive its interrelated case, that it
18 vigorously contested the use of cash collateral. And then,
19 thirdly, for the record, my review of it, the Court did not
20 make a finding that the use of cash collateral violated the
21 automatic stay. And I --

22 THE COURT: Mr. Couchot, the only record that exists
23 in this record, which is written down, we don't have to
24 characterize it --

25 MR. COUCHOT: Right.

1 THE COURT: -- relates to a general motion made by
2 your client for relief from the automatic stay. That motion
3 was denied by final order without prejudice --

4 MR. COUCHOT: Yes.

5 THE COURT: -- with statements made on the record
6 that we don't need to recharacterize. You and other counsel
7 involved no doubt have considered the legal consequences of the
8 actions that you have undertaken with eyes wide open. I don't
9 want to hear now argument as to why you believe that the action
10 you have taken is not covered by the order that I entered after
11 denying your motion for relief from stay. It was not a
12 specified targeted motion for relief from stay. Quite the
13 contrary. It was a completely general give us full and
14 complete relief from stay. Motion denied. That means that the
15 stay applies to the extent it applies. As you well know as an
16 experienced bankruptcy lawyer, careful lawyers almost always,
17 when there's a close question, seek relief from stay to avoid
18 the very severe sanctions that flow from -- especially flow
19 from willful violations of the stay. You're in the zone of a
20 willful violation. And this is not the time for you to defend
21 yourself. That time may come.

22 MR. COUCHOT: Yes, Your Honor.

23 MR. WAISMAN: Your Honor, Shai Waisman. I actually
24 thought that the issue was resolved. But based on the
25 statements that Keeping (ph.), I have concern as to what

1 resources this estate has to expend in defending what is
2 clearly within the stay and clearly within what was raised,
3 argued and ruled on before this Court. I thought we were
4 concluded.

5 THE COURT: I thought we were, too. But then again,
6 every time I think we're done, I hear another argument from
7 California as to why there's some belief the use of cash
8 collateral is not covered by the automatic stay. I'm not
9 deciding that now. It's not before me. But lawyers can figure
10 this out. The use of cash --

11 MR. COUCHOT: I am sorry, Your Honor --

12 THE COURT: The use of cash collateral happens at the
13 beginning of most Chapter 11 cases and involves either consent
14 or adequate protection. That's Bankruptcy 101.

15 Now, can we conclude this evening's hearing? And if
16 so, how?

17 MR. WAISMAN: I believe for the debtors we can
18 conclude the hearing. I would think for the assistance of this
19 Court and this debtor, if Mr. Couchot could advise based on the
20 Court's comments tonight whether we're proceeding with an
21 attempt to use the debtor's cash collateral or the SCC entities
22 are going to regroup and advise how they will proceed next
23 including to fully vindicate their rights before this Court.
24 That would go a long way and be very helpful. If we need to
25 defend against the use of cash collateral in California, we

1 will do so. And at the same time, we will bring additional
2 motion practice before Your Honor.

3 MR. COUCHOT: My recommendations to my client will be
4 to come back to New York and file a motion for use of cash
5 collateral -- I mean, for relief from stay for the use of cash
6 collateral.

7 THE COURT: I'll tell you what. If the lawyers
8 involved are going to have a conversation about how to resolve
9 the matter which is not before me but is before Judge Smith in
10 the Central District of California, that doesn't have to be on
11 this record.

12 MR. WAISMAN: In that case, Your Honor, perhaps we
13 can take leave of the Court and Mr. Couchot and I can
14 conference afterwards and assuming these debtors are properly
15 convinced that there is no more of a -- no risk with violations
16 of the stay, the matter would be concluded. And if not, it
17 would be our burden to come back to Your Honor.

18 THE COURT: Fine. If you need further access at any
19 time before the hearing is presently scheduled, you can have
20 such access on Monday.

21 MR. WAISMAN: Thank you, Your Honor. That's greatly
22 appreciated as is the access today and apologize to everybody
23 for the short notice.

24 THE COURT: No. This is an important matter and no
25 apologies are needed.

1 MR. COUCHOT: Thank you, Your Honor.

2 MR. WAISMAN: Thank you, Your Honor.

3 THE COURT: Have a good weekend, all. Bye.

4 MR. WAISMAN: Bye.

5 (Whereupon these proceedings were concluded at 5:18 p.m.)

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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Previous ruling of 11/20/08 denying SCC entities' relief from the automatic stay enforced	16	24

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

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Date: February 2, 2009